STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 23, 2002
v	No. 229285 Oakland Circuit Court
AARON LEE SMITH, JR., Defendant-Appellant.	LC No. 1999-170043-FH

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f; felonious assault, MCL 750.82; carrying a concealed weapon, MCL 750.227, reckless use of a firearm, MCL 752.863a; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 90 days' imprisonment for reckless use of a firearm, 2 to 10 years' imprisonment each for felon in possession and carrying a concealed weapon, and 2 to 8 years' imprisonment for felonious assault. These sentences were to be served consecutive to concurrent terms of 2 years' imprisonment for each count of felony-firearm. Defendant appeals as of right. We affirm.

I. Facts

This case arises from an incident at Nickels, a bar located within the Michigan Inn, in Southfield. On December 21, 1999, the victim and a friend went to Nickels between the hours of 10:30 and 11:30 p.m.[1] The victim testified that at approximately 12:15 a.m., she was confronted by a heavy-set, African-American man wearing a leather jacket with a cream or orange stripe. The victim claimed that this man forcefully, and without provocation, pushed her friend. She stated it appeared to her that the man was drunk because he was staggering and uttering obscenities. During the altercation, the man produced a silver-colored gun and pointed it at the victim's back. The victim testified that she walked away from the man and did not see him again that night. The victim's friend later pointed the assailant out to a security guard. While neither

[1] We note that the victim and her friend were under the age of twenty-one and initially gave false names to the police.

the victim nor her friend were able to positively identify defendant as the assailant, both recognized the jacket and gun in evidence as the assailant's.

Mr. Jody Bryant was working as a security guard for Nickels on the night in question. He testified that bouncers from the club informed him of a situation inside the bar. As a result, Bryant claimed that he escorted a black man wearing a Pelle Pelle jacket with orange stripes outside. Once outside, the man produced a silver gun and told Bryant not to follow him. Bryant stated that the gun could have been a nine-millimeter. While walking away, Bryant heard gunshots and observed the offender shooting at a vehicle. Bryant identified the jacket and gun in evidence as belonging to the shooter.

Two police officers responded to a dispatch concerning the shooting at the Michigan Inn. The police discovered defendant in a nearby residential area and arrested him because he matched the basic description of the suspect. While approaching defendant, one of the officers noticed him throw an object on the grass. The officers discovered a pair of gloves and a silver nine-millimeter handgun near where defendant had been standing. Despite the fact that there was frost on the grass, there was no frost on either the gloves or the gun. A police expert testified that shell casings found at the Michigan Inn matched others fired from this weapon.

II. Sufficiency of the Evidence

Defendant argues that the prosecutor failed to present sufficient evidence to support his conviction of felonious assault and the underlying felony-firearm charge. We disagree. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

Defendant specifically alleges that the prosecution failed to present sufficient evidence that he was the assailant inside the bar. Even if the evidence could link him to the shooting outside the Michigan Inn, defendant claims that there is no evidence physically placing him inside the bar. Defendant notes that the witnesses were unable to positively identify him as the assailant and that their descriptions of the jacket and gun varied. Defendant argues that several people wore jackets like his and that any similarities were mere coincidence.

While the witnesses' description of the assailant's jacket varied from blue to black, testimony established that it was dark inside the bar. Moreover, each witness clearly remembered that it was a designer leather sports jacket, similar to a Pelle Pelle, with a cream or orange stripe. The victim testified that while there were other males in the bar, her assailant was the only one she remembered wearing this particular jacket. Other witnesses also identified the jacket admitted into evidence as the one worn by the assailant. Despite the fact that defendant's jacket was gray with orange and white stripes, the jury could reasonably infer that it appeared darker in a dimly lit bar.

Defendant's identification as the assailant was further reinforced by the similarities between the witnesses' description of the gun used in Nickels and the gun found near defendant. The victim testified that the gun in evidence resembled the one she saw on the night in question. Her friend further described the assailant's gun as a nine-millimeter chrome gun with a black handle. She claimed that the gun in evidence looked like the one she saw that night. Bryant also testified that the gun in evidence appeared to be the same weapon used by the assailant.

Defendant was arrested near the scene of the crime with a jacket and weapon that matched those used by the assailant, according to several witnesses. Moreover, Nickels is located inside the Michigan Inn and the shell casings outside the Michigan Inn matched those fired from the weapon discovered near defendant when he was arrested. Despite the lack of a positive identification of defendant as the assailant, this strong circumstantial evidence supports the conclusion that the person shooting outside the bar was the same person who threatened the victim with his gun shortly beforehand. Viewing the evidence in the light most favorable to the prosecution, a reasonable juror could conclude that defendant was the assailant.

III. Double Jeopardy

Defendant further argues that his convictions and sentences for felon in possession of a firearm and felony firearm violate federal and state constitutional prohibitions against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We disagree. Whether double jeopardy applies is generally a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). However, because defendant failed to properly preserve this issue for appeal, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We addressed this precise issue in *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), and held that convictions for felony-firearm and felon in possession do not violate the prohibition against double jeopardy. According to *Dillard, supra* at 169-171, the felony-firearm and felon in possession statutes prohibit different crimes and address distinct social norms. We further note that the *Dillard* opinion is binding precedent under MCR 7.215(I). Thus, defendant has failed to establish plain error.

IV. Jury Instructions

Defendant next contends that he was denied a fair trial because the trial court failed to give an adverse witness instruction to the jury concerning a witness that the prosecution endorsed but never produced. We disagree. It is the function of the trial court to clearly present the case to the jury and instruct it on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). However, "[t]he failure of the court to instruct on any point of law shall not be ground[s] for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29. We will only reverse a verdict on this basis to avoid manifest injustice. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000).

The general rule is that a witness endorsed by the prosecutor must be produced at trial. *People v Cummings*, 171 Mich App 577, 584-585, 430 NW2d 790 (1988). "However, a prosecutor may be relieved of his duty to produce a res gestae witness by showing that the res gestae witness could not be produced despite an exercise of due diligence." *Id*. at 585. The

applicable standard jury instruction advises the jury that it may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. CJI2d 5.12.

The prosecution listed Sylvester Davis on the information and the first-amended information as an endorsed witness, MCL 767.40a(3), who "would" be called at trial, but listed Davis on the second-amended information only as a potential witness, MCL 767.40a(1), who "might be called" at trial. However, in opening statements the prosecutor identified Davis as someone who would testify that he saw defendant come out of Nickels, wearing a jacket with orange stripes and carrying a gun. The next day, the prosecutor explained to the trial court that efforts to procure Davis had failed.[2] In response, defense counsel stated that she wanted Davis to testify and would like to preserve the right to ask the trial court for an adverse witness instruction. The trial court observed that the latest witness list presented Davis as a witness who "might" be called, but noted that Davis' name was read to the jury. Nevertheless, this issue was not discussed further and the trial court failed to make any findings concerning the prosecution's due diligence in producing Davis.

Defendant characterizes this exchange as showing that the trial court found a lack of due diligence by the prosecution and an openness to providing an adverse witness instruction. Conversely, plaintiff interprets this as a denial of defense counsel's request for an adverse witness instruction. However, a careful review of the record reveals that the questions of due diligence and an adverse witness instruction were left open for possible resolution later in the proceedings. The lack of any further development of this issue, including defense counsel's failure to request an adverse witness instruction, suggests that the matter was abandoned. Moreover, defense counsel expressed satisfaction with the instructions given to the jury. See *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999). Thus, this issue was forfeited on appeal and defendant waived any error. See MCL 768.29; *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

V. Post-Arrest Silence

Defendant further argues that reversal is required because the prosecutor questioned a police witness about defendant's post-arrest silence. The constitutional privilege against self-incrimination and the right to due process limit the use of a defendant's silence as evidence in a criminal trial. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001). Indeed, it is well established that silence may not be used as substantive evidence of guilt. *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973). However, we note that this constitutional preclusion of evidence does not automatically extend to a brief and oblique reference of a defendant's silence. *Dennis*, *supra* at 576-580. Further, silence is not protected unless it occurs during a custodial interrogation or in reliance on *Miranda*[3] warnings. *People v Schollaert*, 194 Mich App 158, 165-166; 486 NW2d 312 (1992).

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[2] The prosecution sent Davis a bus ticket to come to court from Cleveland. However, it was not informed until the morning of the second day of trial that the electronic ticket would not work.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In this case, the following colloquy took place between the prosecutor and one of the arresting police officers:

> Q. What if anything happened when [defendant] was placed under arrest—did he say anything or do anything?
>
> A. Not as he was placed under arrest, no.
>
> Q. Did he—did there come a time when you had contact with him after he was placed under arrest?
>
> A. Yes. I went up to the jail . . . and he was quite irate and yelling.
>
> * * *
>
> Q. What is your opinion as to his state at that time?
>
> A. He was more angry, upset, irate not what someone would think of a typical drunk, intoxicated person.
>
> If he was intoxicated, it wasn't anything that showed.
>
> * * *
>
> Q. After you got off the elevator, what if anything happened?
>
> A. He wouldn't answer any questions. Again, he was angry, irate, wouldn't cooperate at all.

The record does not indicate whether defendant was advised of his *Miranda* rights to remain silent and to have an attorney present during custodial interrogation. Moreover, it does not appear to this Court that the prosecution was attempting to elicit this testimony as substantive evidence of defendant's guilt. Regardless, defense counsel waived any error because it continued this line of questioning during cross-examination. *People v Sutton (After Remand)*, 436 Mich 575, 596; 464 NW2d 276 (1990).

The following dialogue occurred between defense counsel and Sergeant Stevenson on cross-examination:

> Q. At the police station . . . you indicate that he was not at all cooperative?
>
> A. Correct.
>
> Q. And he was verbally aggressive?
>
> A. Correct.
>
> Q. And was he cursing?

A. Yes.

Q. Using a lot of profanity?

A. Yes.

Q. He never appeared just calm and collected?

* * *

A. When I saw him? No.

Q. And in fact, he wouldn't answer any questions; correct?

A. Correct.

* * *

Q. Well, in your police report you say he didn't answer any questions and refused prints and pictures.

A. Okay.

Defense counsel was attempting to prove that defendant was heavily intoxicated when arrested. Such evidence of intoxication could negate the specific intent required to establish felonious assault. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). We note that the trial court instructed the jury on intoxication, as a defense theory that defendant was too intoxicated to specifically intend to assault the victim. The above exchange clearly indicates that defense counsel chose to pursue this line of questioning and thereby waived any potential error. *Sutton, supra* at 596.

VI. Ineffective Assistance of Counsel

Defendant asserts that his trial counsel's failure to preserve the previous two issues constitutes ineffective assistance of counsel. We disagree. Because defendant did not raise this issue before the trial court, our review is limited to error apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant has failed to establish a reasonable probability that defense counsel's failure to request an adverse witness instruction affected the trial's outcome. There was strong circumstantial evidence placing defendant at both crime scenes. While the instruction would have allowed the jury to presume that the missing witness' testimony was adverse to the prosecution, in light of the evidence presented it is unreasonable to conclude that the prosecution's witness could have exonerated defendant. We further note that it appears the prosecution exercised due diligence in its efforts to produce the missing witness. See *Cummings, supra* at 585.

Moreover, defendant has not overcome the strong presumption that his trial counsel's failure to object to questions regarding defendant's post-arrest behavior was sound trial strategy. *Carbin, supra* at 600. This Court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Because defense counsel's failure to object to this testimony appears to be based on an attempt to prove defendant was too intoxicated to form specific intent, defendant has not established ineffective assistance of counsel. See *id.*

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey